(27)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 523

SOUTHGATE BROKERAGE COMPANY, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX

Table of Citations

Cases

Statutes

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Southgate Brokerage Company, Inc., by its attorneys, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit, entered in the above proceeding on July 19, 1945 (R. 107), which affirmed an order of the Federal Trade Commission made on September 12, 1944 (R. 40).

Statement of the Matter Involved

Such facts as are found by the Commission are not in dispute. Petitioner is a merchandising broker of food commodities, occupying an intermediary position between food processors, or packers, and the wholesale trade, or jobbers, to whom it sells exclusively (R. 52, 88). Its principal office and place of business is located in Norfolk, Virginia, and it has branch offices and warehouses in Winston-Salem, Charlotte, Wilmington, and Greensboro, North Carolina (R. 42).

Petitioner's brokerage business is conducted in three ways, this proceeding being concerned only with those in the third category (R. 42-3, 88-9). *First,* sales to wholesalers, wherein petitioner merely negotiates the sale and the products are shipped and billed directly by the packers to the wholesale buyers; *secondly,* sales made from stocks consigned by the packers to petitioner, on which petitioner does the billing and assumes credit responsibility, remitting to principals monthly; and, *thirdly,* sales made from stocks kept in its warehouse, to which at the request of the producers or packers petitioner takes title under contracts with the packer limiting the sale thereof to wholesalers only, and within a specified trade territory (R. 31, 52, 93, 95).

About 60% of petitioner's business is made up of this latter type of business (R. 43), which, the offered evidence shows (R. 90, 93, 95-6), has for many years been recognized by the packers, and by the trade, as a definite and necessary function of the merchandising brokerage business, particularly in the southern part of the United States, because of the large number of wholesale grocers in those States, whose unit purchases are small, and who are unable to buy in carload lots, so that it would be necessary to have from 25 to 50 consignees in order to have enough customers to take one carload.

Packers who cannot undertake to arrange direct shipments to these small wholesalers, particularly those on the West Coast, require petitioner to take title, and resell for distribution (R. 91). If these services were discontinued by the merchandising brokers in this area, the offered evidence shows (R. 88, 91-2), the result would be to deny small wholesale grocers access to certain food products, in that if they were to attempt to obtain shipments, as they would be forced to do, in less than carload lots, the freight differentials would be so high as to put them at a substantial competitive disadvantage, and the large wholesaler, who is able to buy in carload lots would acquire a monopoly of that business.

In connection with its services as distributor in this third class of business, the offered evidence shows (R. 88) that petitioner receives, warehouses, handles, advertises, promotes the sale of, sells, invoices and collects for the products to which it takes title, and it is the compensation or allowance which petitioner receives for these services, which is broadly denominated "brokerage," that the Commission's order actually proscribes. The offered evidence also shows (R. 89, 92) that said compensation is available on proportionally equal terms to all other brokers with whom, *and only with whom,* petitioner competes (R. 62, 78).

This action arises from cross-appeals to the United States Circuit Court of Appeals for the Fourth Circuit from an order issued by the Federal Trade Commission under subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Anti-Discrimination Act, approved June 19, 1936 (15 U. S. C. A., sec. 13).

The order directs petitioner to cease and desist from:

> "Receiving or accepting from any seller, directly or indirectly, anything of value as brokerage, or any commission, compensation, allowance, or discount in lieu

thereof, upon purchases made for respondent's own account." (R. 46)

Petitioner appealed to the United States Circuit Court of Appeals for the Fourth Circuit from enforcement of said order (R. 66-80), at the same time applying to the court for leave to adduce additional evidence (R. 84-97). The Commission (respondent herein) filed a cross-appeal praying for a decree affirming the order and commanding compliance therewith (R. 82).

The Circuit Court of Appeals entered judgment denying both petitioner's appeal and its application for leave to adduce additional evidence, and granted the Commission's cross-appeal, commanding petitioner to comply with the order (R. 107). Enforcement of the judgment has been stayed pending the final action of this Court (R. 109).

Petitioner challenges the Commission's order in the following respects: (1) The failure of the Commission to make any finding as to whether or not services were or were not rendered for the compensation received by it renders the order void as lacking in an essential and basic finding necessary for its support; (2) The refusal of the Commission and the court below to permit petitioner to introduce evidence, which it offered, as to the services it rendered sellers, for which it received the compensation in question, and the fact that such compensation was available proportionally to its competitors, denied petitioner the full hearing to which it is entitled under the law; (3) It is contrary to the plain language of subsection 2(c) which provides expressly that payments made by a seller "for services rendered" are excepted from the prohibition of the section; (4) Even if the compensation petitioner received for its services was prohibited by subsection 2(c), then it is compensable under subsection 2(d), which permits such compensation to a cus-

tomer when same is available on proportionally equal terms to all competitors of that customer.

Jurisdiction

The jurisdiction of this Honorable Court to review the judgment herein upon certiorari is provided by section 11 of the Clayton Act (38 Stat. 734; 15 U. S. C. A., sec. 21), and section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. A., sec. 347(a)).

Questions Presented

1. Whether an order of the Federal Trade Commission, based upon subsection 2(c) of the Robinson-Patman Act, can be sustained without *any* finding by the Commission as to whether services were or were not rendered by the party who receives the compensation?

2. Whether the refusal of the Commission and the court below to permit petitioner to introduce evidence to show the true nature of the services rendered by petitioner, and of the compensation received therefor, and that such compensation was available on proportionally equal terms to all other customers of the seller who competed with petitioner, denied to petitioner the full hearing to which it was entitled by law?

3. Whether a seller is prohibited by subsection 2(c) of the Robinson-Patman Act from paying compensation to the other party for services rendered, or to be rendered, when the other party, in connection with regularly established brokerage practices, takes title to the property of the seller in furtherance of the distribution as directed by the seller?

4. Whether compensation for services rendered by a customer to a seller (authorized under subsection 2(d) of the Robinson-Patman Act if available on proportionally equal terms to all competitors of said customer) is rendered unlawful by the prohibitions of subsection 2(c) of said Act because the customer in the course of the distributing process takes title to the goods in question?

Reasons Relied on for the Allowance of the Writ

1. The decision below establishes a far-reaching and dangerous departure from precedent, in that it upholds an order of an administrative tribunal wholly lacking in findings as to essential and basic facts necessary to bring petitioner within the scope of the statutory authority involved therein, and as such it is contrary to an unbroken line of decisions of this Court.

Morgan v. *United States*, 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906;

United States v. *B. & O. R. R. Co.*, 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268;

Florida v. *United States*, 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119;

Mahler v. *Eby*, 264 U. S. 32, 68 L. Ed. 549, 44 S. Ct. 283;

F. T. C. v. *Curtis Publishing Co.*, 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210;

Wichita R. & Light Co. v. *P. U. Comm.*, 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51;

Steam Tug E. A. Packer v. *New Jersey Lighterage Co.*, 140 U. S. 360, 35 L. Ed. 453, 11 S. Ct. 794;

Graham v. *Bayne*, 18 How. 60, 15 L. Ed. 265.

2. The refusal of the Commission and the court below to permit petitioner to introduce evidence showing the true nature of the brokerage services rendered to the sellers and of the compensation received therefor, as well as the fact

that there was no discriminatory conduct involved, denied petitioner the full and fair hearing to which it is entitled under an unbroken line of decisions of this Court.

Opp Cotton Mills, Inc. v. *Administrator,* 312 U. S. 126, 85 L. Ed. 624, 61 S. Ct. 524;

Morgan v. *United States,* 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773;

Ohio Bell Tel. Co. v. *Pub. Util. Com. of Ohio,* 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724;

Morgan v. *United States, supra;*

Atchison, Topeka & Santa Fe R. Co. v. *United States,* 284 U. S. 248, 76 L. Ed. 273, 52 S. Ct. 146;

B. & O. R. R. Co. v. *United States,* 264 U. S. 258, 68 L. Ed. 667, 44 S. Ct. 317;

I. C. C. v. *Louisville & Nashville R. R.,* 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185.

3. The decision below presents "a clear cut mistake of law of real importance" (*Bingham* v. *Commissioner,* June 4, 1945, Adv. Op., Vol. 89, No. 16, p. 1191). It is the first or test case in which a merchandising broker, following well recognized and established brokerage methods has been charged with violation of the Robinson-Patman Act for receiving non-discriminatory compensation in connection with the legitimate services it renders, solely because of the fact that in connection therewith it takes title to some of the goods it distributes. The decision in question will penetrate deeply into accepted trade practices, affecting not only merchandising brokers in the conduct of their business, but small producers, packers and processors, wholesalers and jobbers, who will be prejudiced if this method of distribution is denied to them.

4. The court's decision below completely invalidates the express exception provided to the prohibitions set forth in subsection 2(c), permitting payment by sellers for serv-

ices rendered, when the services are performed by the other party to the transaction, and thereby renders nugatory the provisions of subsection 2(d) which permits payment of compensation by sellers to customers where the same is available on proportionally equal terms to all other competing customers.

5. Many similar cases, involving both processors, or packers, and distributors, are being held by the Federal Trade Commission awaiting the decision of this Court in the case at bar. This Court has never passed upon what constitutes "services rendered" within the meaning of this important statute, and the question should be authoritatively settled to finally determine the issue.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 5331, Southgate Brokerage Company, Inc., Petitioner, versus Federal Trade Commission, Respondent, and that the said judgment of the said United States Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

SOUTHGATE BROKERAGE COMPANY, INC.,
By WILLIAM P. SMITH,
CHARLES L. KAUFMAN,
Attorneys for Petitioner.

Of Counsel:
GUILFORD JAMESON.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

SOUTHGATE BROKERAGE COMPANY, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions Below

The findings as to the facts and conclusion, and the order of the Federal Trade Commission, were adopted on September 12, 1944, Docket No. 4821, and appear at pages 40 to 46, inclusive, of the record.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is reported in 150 Fed (2d) 607, under the title *Southgate Brokerage Co., Inc.*, v. *Federal Trade Commission.* It also appears in the record at pages 99 to 107, inclusive.

II

Jurisdiction

1. The jurisdiction of this Honorable Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, c. 229, sec. 1; Title 28, U. S. C. A., sec. 347(a)), and section 11 of the Clayton Act (38 Stat. 734; Title 15, U. S. C. A., sec. 21).

2. The judgment of the United States Circuit Court of Appeals to be reviewed was entered on July 19, 1945 (R. 107).

III

Statement of the Case

A summary statement of the pertinent facts is given in the petition at pages 2 to 5, above, and in the interest of brevity is not repeated here.

IV

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In sustaining an order of the Federal Trade Commission which lacks the basic and essential findings of fact to support it.

2. In sustaining an order of said Commission based upon a proceeding wherein petitioner was denied a full and fair hearing.

3. In holding that petitioner is in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Anti-Discrimination Act (49 Stat. 1526; 15 U. S. C. A., sec. 13(c)).

4. In holding that petitioner did not have the right to receive the compensation involved herein under subsection

(d) of Section 2 of said Act (49 Stat. 1526; 15 U. S. C. A., sec. 13(d)).

V

ARGUMENT

Summary of the Argument

Point A. The order of the Federal Trade Commission is fatally defective in that the Commission made no finding whatsoever as to whether services *were or were not* rendered by petitioner—the findings, conclusion and order being entirely silent as to this essential statutory point. This is directly contrary to the rule established by applicable decisions of this Court.

Point B. Petitioner was denied the opportunity to show the true nature of the services rendered and of the compensation received therefor. It was, likewise, denied the opportunity to show that the prices at which it bought and the compensation which it received were available on proportionally equal terms to all who compete with it in the distribution of the commodities. This denial prevented petitioner from receiving the fair hearing to which it was entitled by the statute and the applicable decisions of this Court.

Point C. Subsection 2(c) of the Robinson-Patman Anti-Discrimination Act does not prohibit receipt of compensation for bona fide services actually rendered to sellers, but specifically excepts same from its prohibitions.

Point D. Subsection 2(d) of the said Act expressly deals with services or facilities rendered by a customer to sellers, and permits compensation therefor when same is, as here, available on proportionally equal terms to all who compete with such customer in the distribution of the commodities.

Point A

The Commission's Order is Fatally Defective in That It Failed to Find Either That Services Were or Were Not Rendered Under Subsection 2(c).

The Commission failed to find either that services *were or were not* rendered by petitioner. With subsection (c) containing a positive exception permitting the payment of compensation where services are rendered to the seller (*infra*, p. 20; with the answer affirmatively alleging that such services were rendered by petitioner (R. 11), and this allegation being nowhere denied, we respectfully submit that it was indispensable to the validity of the Commission's order, that the Commission affirmatively find that no such services were rendered by petitioner.

This Court has repeatedly held that orders of administrative tribunals must be supported by findings of the basic and essential facts needed to support its conclusions. We quote below from page 480 of this Court's decision in *Morgan* v. *United States*, 298, U. S. 468, decided in 1924, and frequently cited with approval by the Court in later decisions:

> "There must be evidence adequate to support pertinent and necessary findings of fact. * * * Facts and circumstances which ought to be considered must not be excluded. * * * *Findings based on the evidence must embrace the basic facts* which are needed to sustain the order." (Citing numerous cases.) (Italics added.)

Again in *Mahler* v. *Eby*, 264 U. S. 32, at pages 43, 45, the Court said:

> "There is no authority given to the Secretary to deport except upon his finding, after a hearing, that the petitioners were undesirable residents. * * *

> The warrant *lacks the finding required by the statute* and such a fundamental defect we should notice. It goes to the existence of the power on which the proceeding rests" (Italics added.)

And in *Wichita Railroad and Light Company* v. *P. U. Comm.*, 260 U. S. 48, at page 59, this Court held:

> "When therefore, such an administrative agency is required, as a condition precedent to an order, to make a finding of facts, *the validity of the order must rest upon the needed finding.* * * *
>
> "It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this." (Italics added).

See also *Steam Tug E. A. Packer* v. *New Jersey Lighterage Company*, 140 U. S. 360, at page 365, wherein this Court, speaking of the rule in judicial proceedings, held:

> "The rule is general, that wherever the trial court finds the facts and conclusions of law therefrom, *it is bound to find every fact material to its conclusion*, and a refusal to do so, if properly excepted to, is ground for reversal" (Italics added).

See also other cases cited on page 6 of the petition herein.

We respectfully submit that the failure of the Commission to make findings on the matters herein specified is fatal to the legality of the order in question.

Point B

Denying Petitioner the Right to Prove the Services It Rendered Sellers, the True Nature of the Compensation Received Therefor, and That the Payments Were Not Discriminatory, Prevented It From Receiving a Fair Hearing

Petitioner offered to prove that during the entire 50 years of its existence it has been consistently recognized as a merchandising broker, and that the term "brokerage" as used in its business covered compensation for services rendered in receiving and breaking cars, warehousing, handling, advertising, promoting the sale of, selling, invoicing, collecting, etc., for the products which it was distributing under this method for the packer.

The services which petitioner renders in respect to such goods are obviously greater and more costly than those rendered in respect of much of the goods to which it does not take title, the compensation on which is not questioned here. But with regard to the merchandise in either category, petitioner performs the same basic function and service so far as the packer is concerned—selling and distributing the packer's produce to the wholesale trade.

Petitioner, however, was denied the opportunity to show any of this, either the true nature of the compensation it received, the bona fide services which it actually rendered therefor at the request of its principals, or that the same prices and compensation were available on proportionally equal terms to all who competed with it in the distribution of the commodities.

This evidence, petitioner strongly maintains, was highly material to the issues herein, and denying its admission completely and effectively prevented petitioner from showing cause why the order should not be entered against it by the Commission. The action of the Commission and

the court below, we respectfully submit, prevented petitioner from receiving the full and fair hearing contemplated by the statute and provided by the unbroken line of decisions of this Honorable Court.

In *I. C. C.* v. *Louisville & Nashville R. R.*, 227 U. S. 88, at page 91, this Court held:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved."

Again, in *B. & O. R. R. Co.* v. *United States*, ("The Chicago Junction Case") 264 U. S. 258, at page 265, the Court stated:

> "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance therewith."

And, in *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, at page 155, the Court held:

> "* * * it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies."

Also, see other cases cited on page 7 of the petition herein.

In view of the foregoing, we respectfully submit that petitioner has been denied its lawful right to a full and fair hearing.

POINT C

Subsection 2(c) of the Robinson-Patman Act Does Not Prohibit Receipt of the Compensation Involved Here

The plain, certain and unambiguous language of subsection 2(c) of the Robinson-Patman Act permits the payment and receipt of compensation, *if services are rendered*

therefor. To construe it otherwise is to render the exception nugatory. The construction given by the court below constitutes a grave error of law in holding in effect that under no circumstances can a seller pay brokerage or other compensation where the other party to the transaction takes title to the commodity, irrespective of the purpose for which this may be done. That construction would obviously be the effect of the section, if it had been enacted *without the express exception provided for in case of services rendered.*

But, the proffered evidence, which petitioner was denied the right to produce, showed that it has always been regarded both by its principals and its customers as representing the sellers in the capacity of an independent broker (R. 93, 95-6). It showed, further, that the compensation petitioner received from its principals was for bona fide *services actually rendered* as an intermediary in the distribution process, and exactly what those services and compensation covered (R. 88). It also showed why it was necessary, as part of its complete brokerage service, for petitioners on occasions to take title to part of the commodities which it distributed for its principals (R. 88, 90-2). These facts clearly and, we submit, effectively, distinguish the instant case from *Great Atlantic & Pacific Tea Co.* v. *F. T. C.*, 106 Fed. (2d) 667, and other like cases, cited and relied upon by the court below.

Petitioner, in brief, was denied the opportunity of showing how and why it came directly within the clearly expressed exception to the prohibitions of subsection 2(c). The court below has taken the position that regardless of petitioner's real functions, inasmuch as it buys certain goods, it is denied the right to compensation, because as a "buyer" it cannot as a matter of fact or of law, render services to the seller. Manifestly, if petitioner is deemed not to have rendered any service in connection with com-

modities to which it takes title, it cannot be because of any *fact;* it is solely because of a construction of the *law,* which petitioner, respectfully submits, subsection 2(d) of the Act clearly shows to be erroneous.

Point D

Subsection 2(d) Clearly Recognizes That It Is Possible for a Buyer To Furnish Services To a Seller, and Governs If Petitioner Is Held To Be a Buyer.

If the rendition of services by a buyer to a seller is held to be a legal impossibility, then subsection 2(d) of the Act in question becomes entirely a nullity, for it permits that very thing to be done, provided the compensation therefor is available on proportionally equal terms to all other competing customers of the seller. But it is a well recognized canon of statutory construction that different sections of a statute should be construed so as to harmonize with each other, rather than so as to make them stand in conflict.

Although petitioner denies that by taking title as part of its distributive function, it is disqualified as an intermediary to receive compensation under subsection 2(c), even if this were the case, subsection 2(d) permits it to be compensated by the seller. That subsection expressly provides in the clearest of terms that a buyer *can* furnish services to a seller in the "handling, sale, or offering for sale" of the products being distributed.

The sole provision of section 2(d) qualifying the payment of compensation to petitioner is that same shall be available on proportionally equal terms to all who perform the same function and compete with it in the distribution of the products. As to this, the law is crystal clear. But petitioner has been denied the opportunity to show the basic facts that the services were performed in the "handling, sale or offering for sale," and that the compensation was

available on proportionally equal terms to its competitors.

These facts as to the non-discriminatory character of the compensation received—that it was available on proportionally equal terms to all other customers who competed with petitioner in the distributive function—further, and most effectively, distinguish the instant case from *Great Atlantic & Pacific Tea Co.* v. *F. T. C., supra,* and the others relied upon by the Circuit Court of Appeals. For obvious reasons, the buyers there were neither concerned with, nor interested in, compensation of a non-discriminatory nature.

Furthermore, it will be noted that the decisions of the Commission, itself, clearly recognize that the payment of compensation to a customer for carrying warehouse stocks for spot distribution, and furnishing promotional and selling services and facilities, is not prohibited when such compensation is made available on proportionally equal terms to all who are competitors of such customer.

Lambert Pharmacal Co., 31 F. T. C. 734;
American Crayon Co., 32 F. T. C. 306;
Binney & Smith Co., 32 F. T. C. 315.

Petitioner should not be deprived of the benefit of subsection 2(d) simply because the complaint was issued under subsection 2(c), and there is not the slightest justification for construing this Act so that under one provision a practice is approved and under another is condemned. We respectfully submit that there is no conflict between the sections, but if there were one, under the law petitioner is entitled to an interpretation that would be most favorable to it.

Conclusion

The decision below involves a question of federal law which has never been passed upon by this Court, and one of vital importance to those engaged in the production

and distribution of food. If petitioner's view is correct, said decision involves a grave error in the construction of this federal law, which is of wide application, and is in direct conflict with an unbroken line of decisions of this Court with reference to the fundamental requirements of findings of fact by administrative tribunals, and the granting of a full and fair hearing in such proceedings.

For the reasons herein set forth, we respectfully submit, the decision should be reviewed by this Court and a writ of certiorari should issue for that purpose as prayed in the foregoing petition.

Respectfully submitted,

SOUTHGATE BROKERAGE COMPANY, INC.,
By WILLIAM P. SMITH,
CHARLES L. KAUFMAN,
Attorneys for Petitioner.

Of Counsel:
GUILFORD JAMESON.

APPENDIX

The Clayton Act, approved October 15, 1914, as amended by the Robinson-Patman Anti-Discrimination Act,[1] approved June 19, 1936, insofar as pertinent herein, provides as follows (49 Stat. 1526; 15 U. S. C. A., sec. 13):

"Sec. 13. Discrimination in price, services, or facilities—

* * * * * * *

"Payment or acceptance of commission, brokerage or other compensation

"(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"Payment for services or facilities for processing or sale

"(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as com-

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[1] *Note:* The Robinson-Patman Anti-Discrimination Act amended section 2 of the original Clayton Act. The quoted provisions, therefore, are generally known, and referred to in the petition and brief, as subsections 2(c) and 2(d), rather than as subsections 13(c) and 13(d) as they appear in Title 15 U. S. C. A.

pensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

INDEX

CITATIONS

673332—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 523

SOUTHGATE BROKERAGE COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The findings, conclusions, and order of the Federal Trade Commission (R. 40–46) are not yet reported. The opinion of the Circuit Court of Appeals (R. 99) is reported in 150 F. 2d 607.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on July 19, 1945 (R. 107). The petition for a writ of certiorari was filed on October 18, 1945. The jurisdiction of this Court is invoked

under Section 11 of the Clayton Act, 38 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 2 (c) of the Clayton Act makes it unlawful for a buyer of goods to accept brokerage commissions or allowances from the seller of those goods.

2. Whether Section 2 (d) of the Clayton Act has any application to the payment or receipt of brokerage commissions.

3. Whether the Commission improperly rejected any evidence offered by the petitioner.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or in-

direct control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

STATEMENT

The Federal Trade Commission, in a proceeding charging violation of Section 2 (c) of the Clayton Act, made findings of fact which the petitioner does not challenge (Pet. 2), and which may be summarized as follows:

The petitioner's principal business is buying food products and other merchandise for its own account and reselling these goods (R. 42). The petitioner also acts as a broker in selling goods for others but this part of petitioner's business is not involved in the present proceeding (R. 42–43).

The merchandise which petitioner purchases in its own name and for its own account is stored in its warehouses and insured in its name and at its expense. Any taxes levied against it are paid by the petitioner. If the merchandise is damaged while in transit from the seller, claims for the loss are filed by the petitioner in its own name and for its own benefit. Petitioner determines the prices and terms at which it resells the merchandise and makes a profit or sustains a loss on the resale depending upon the course of the market following the original purchase. In short, petitioner's title to the goods is absolute. Some of the products which it purchases and resells bear its own private trade-marks or brands, which are supplied by petitioner and are affixed to the cans or other containers by the packer or canner. (R. 43.)

In many instances petitioner accepts from the sellers of such merchandise a brokerage commission or allowance and discounts in lieu of brokerage. The amount of brokerage thus received has been substantial and for the second half of the year 1941 it exceeded $25,000. (R. 43–44.)

The Commission concluded that such receipt and acceptance of brokerage was in violation of Section 2 (c) of the Clayton Act (R. 44). It accordingly issued an order directing petitioner to cease and desist from accepting any brokerage

commission from any seller upon purchases which petitioner made for its own account (R. 46). The court below, on review of the order, unanimously upheld its validity (R. 99–108).

ARGUMENT

1. Section 2 (c) of the Clayton Act makes it unlawful for any person to pay, or to receive, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, either to the other party to the transaction or to an agent, representative, or other intermediary therein where such intermediary is acting for or on behalf of, or is subject to the control of, any party to the transaction other than the person by whom such compensation is granted or paid. As the court below said: "It is perfectly clear that this provision forbids payment of brokerage on a sale or purchase of goods to the other party to the transaction" (R. 102). See also *Oliver Bros.* v. *Federal Trade Commission,* 102 F. 2d 763, 769–777 (C. C. A. 4).

The sole purpose of the "except for services rendered" clause upon which petitioner relies was to make it clear that neither a seller nor a buyer is prohibited from paying his own agent for services rendered to him. This is explicitly stated in the conference report on the bill and in the earlier

report of the House Judiciary Committee.[1] As the court said in *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission,* 106 F. 2d 667, 674 (C. C. A. 3), certiorari denied, 308 U. S. 625: "At each stage of its enactment, paragraph (c) was declared to be an absolute prohibition of the payment of brokerage to buyers or buyers' representatives or agents."

To construe the "services rendered" clause as constituting a recognition by Congress that a buyer may perform services for the seller for

[1] The conference report (H. Rep. No. 2951, 74th Cong., 2d sess., p. 7) states:

"Subsection (c) deals with brokerage. It is the same as subsection (b) in the House bill, which in turn is the same as subsection (c) in the Senate amendment, except that the words 'except for services rendered,' as contained in the House bill, do not appear in the Senate amendment. In the conference report these words are retained, so that, with adjacent language, it reads:

"'* * * any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise, * * *'

"With the words of the House bill thus retained, this subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other."

The earlier report on the bill by the House Judiciary Committee is substantially to the same effect (H. Rep. No. 2287, 74th Cong., 2d sess., pp. 14–15).

which the seller may pay and the buyer receive compensation by way of a brokerage fee or commission "makes much of its [the Section's] language meaningless; it does violence to the purpose of the Act and has been explicitly rejected in other circuits." *Quality Bakers of America* v. *Federal Trade Commission,* 114 F. 2d 393, 398 (C. C. A. 1). So to construe the clause "would largely destroy the statute, and nullify its plain intent." *Webb-Crawford Co.* v. *Federal Trade Commission,* 109 F. 2d 268, 270 (C. C. A. 5), certiorari denied, 310 U. S. 638.

From the enactment of the Robinson-Patman Act to date, both the Commission and the courts have consistently construed Section 2 (c) as an absolute and unconditional prohibition of the payment of brokerage by a seller to a buyer or his agent upon the buyer's own purchases.[2] Consequently, petitioner's contention that the Commission's order is invalid because the Commission

[2] *Biddle Purchasing Co.* v. *Federal Trade Commission*, 96 F. 2d 687, 690–691 (C. C. A. 2), certiorari denied, 305 U. S. 634; *Oliver Bros.* v. *Federal Trade Commission*, 102 F. 2d 763, 767–768 (C. C. A. 4); *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. 2d 667, 673–674 (C. C. A. 3), certiorari denied, 308 U. S. 625; *Webb-Crawford Co.* v. *Federal Trade Commission*, 109 F. 2d 268, 270 (C. C. A. 5), certiorari denied, 310 U. S. 638; *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 398 (C. C. A. 1); *Jarrett* v. *Pittsburgh Plate Glass Co.*, 131 F. 2d 674, 676 (C. C. A. 5); *Fitch* v. *Kentucky-Tennessee Light & Power Co.*, 136 F. 2d 12, 14–15 (C. C. A. 6); *Modern Marketing Service* v. *Federal Trade Commission*, 149 F. 2d 970, 978 (C. C. A. 7).

failed to find that petitioner renders no services to sellers is without merit. All the Commission had to find was that petitioner was the buyer and was receiving brokerage.

2. Petitioner also contends that Section 2 (d) of the Act authorizes receipt by a buyer of a brokerage commission if the seller offers substantially the same commission to other similarly circumstanced buyers. The Section makes it unlawful for a person to pay anything of value to his customer in consideration for "any services or facilities furnished by or through such customer" in connection with the processing, handling or sale of any commodity sold by such customer, unless such payment is available on proportionally equal terms to all other customers competing in the distribution of such commodity.

As the court below said, Section 2 (d) "has no relation to payment of brokerage to buyers or their agents, which is dealt with in the preceding subsection, but is intended to prevent discriminatory payments by seller to buyer on account of services actually rendered the seller" (R. 106). The court further said (*ibid.*):

> It [Sec. 2 (d)] is commonly referred to as the "advertising allowance" section of the act; and as explained by Representative Utterback in presenting the conference report to the House the words "services or facilities," rather than the term "advertising allowance" were employed for the pur-

pose of making the "prohibitions of the bill * * * intentionally broader * * * in order to prevent evasion." 80 Cong. Rec. 9418. * * * It is little short of absurd to argue that the receipt by a buyer of brokerage on his purchases, forbidden by subsection (c), is validated by subsection (d), the purpose of which is to forbid discriminatory payments for services actually rendered by buyers.

3. Petitioner contends that the Commission erred in rejecting evidence which it offered to show that it performed certain services for sellers, the alleged services consisting of "promoting, offering for sale, selling, ordering, receiving, adjusting shortage or damage claims, handling, warehousing, distributing, invoicing, collecting, and assumption of credit risks" (R. 11). The court below, in holding that this evidence had been properly rejected, said that the crucial fact is that all of the alleged services were rendered by petitioner "in connection with its own purchase, ownership or resale of the goods; and these services it renders, not to those from whom the goods are purchased, but to itself" (R. 104). In addition, since Section 2 (c) unconditionally forbids the receipt by a buyer of brokerage upon his own purchases, and since the Commission's order applies only to "brokerage" or payment "in lieu thereof" (R. 46) and not to compensation for other services, the proffered evidence was imma-

terial to the issues in this case, even if the "services" proposed to be shown are regarded as having been of some incidental benefit to the sellers from whom petitioner purchased.

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 523

SOUTHGATE BROKERAGE COMPANY, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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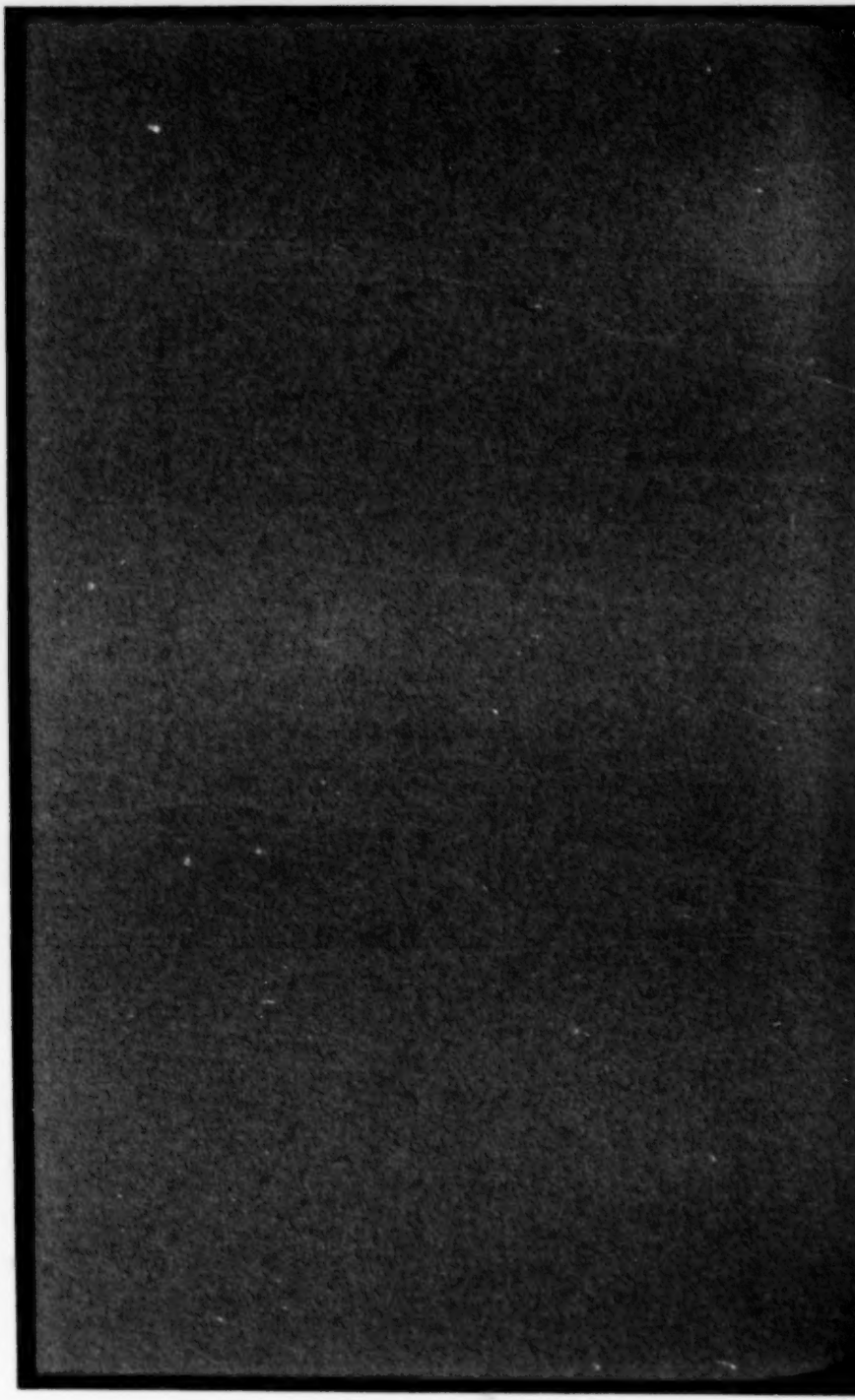

INDEX

CITATIONS

Cases:

Statutes:

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The Issues

In its brief opposing a writ of certiorari herein, the respondent argues that the writ should be denied for the following reasons:

(1) That the petitioner's contention that the order is invalid because the Commission failed to find that petitioner renders no service to sellers is without merit, because

"All the Commission had to find was that petitioner was the buyer and was receiving brokerage";

(2) That subsection 2(d) does not authorize receipt by a buyer of a "brokerage commission," but is intended to prevent discriminatory payments to a customer "for 'any services or facilities furnished by or through such customer' in connection with the processing, handling or sale of any commodity by such customer";

(3) That, since the Commission's order applies only to "brokerage" or payment "in lieu thereof," and not to compensation for other services, the evidence offered by petitioner (to show the true nature of the compensation received and the services actually rendered therefor) "was immaterial to the issues in this case."

This draws the issues very clearly. *First:* Is an order of an administrative agency valid, when it is required to be based on findings of fact and those findings, admittedly, do not incorporate one of the prescribed statutory standards? *Second:* Can an order of the Federal Trade Commission proscribing receipt of "brokerage" under subsection 2(c) of the Robinson-Patman Anti-Discrimination Act stand, when the Commission refused to permit evidence to be introduced showing that the payments are not "brokerage commissions" but, in fact, are compensation for services such as, admittedly, may be compensable under subsection 2(d)?

ARGUMENT

As to Respondent's Point 1

The respondent brushes aside the statutory language of subsection 2(c) by saying that "petitioner's contention that the Commission's order is invalid because the Commission failed to find that petitioner renders no services to sellers is without merit. All the Commission had to find

was that petitioner was the buyer and was receiving brokerage" (respondent's brief, pp. 7-8).

In short, *the Commission flatly and frankly contends that it is not required to make any finding whatsoever as respects the positive statutory exception permitting payment or receipt of compensation "for services rendered* in connection with the sale or purchase of goods, wares, or merchandise."

On the basis of the uniform decisions of this Court, we challenge any such attitude on the part of any administrative agency.[1] The Commission's position plainly is that it is not required to follow the test laid down by the Congress, but may base its order on only part of the directive, set forth for the protection and guidance of legitimate business and the citizens who are endeavoring in good faith to comply with its plain and unambiguous language.

This, we submit, is directly contrary to the rule plainly and succinctly laid down by this Court. In *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489, 495, 86 L. Ed. 971, 62 S. Ct. 722, the Court said:

> "Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. * * * An insistence upon the findings which Congress has made basic and essential to the * * * Commission's action * * * is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' Opp Cotton Mills v. Administrator of Wage and Hour Division, 312 U. S. 129, 144, 85 L. Ed. 624, 635, 61 S. Ct. 524. Hence that requirement is not a mere formal one."

[1] Cases cited, petition, p. 6.

The Commission *categorically admits* that it has failed to follow such prerequisite in this proceeding, and it is plain the case should be remanded to it for compliance with the statutory command that a basic finding be made as to whether services, *in fact,* were rendered by petitioner. That its rendering of services is not a *legal* impossibility, is clearly shown by subsection 2(d), which expressly recognizes such a function.

The real effect of what the Commission urges here is that its order should be sustained on the basis of the statute with the "except for services rendered" clause completely eliminated. It frankly states it was sufficient for it to find that petitioner was the buyer and was receiving brokerage. Admittedly, this would be all it would be required to find under the statute with the "services rendered" clause stricken out, *but it is not all that is required under the statutory language as written by the Congress.*

Under the clear wording of the statute, Congress was not outlawing the payment or receipt of "brokerage," but was outlawing it "except for services rendered." And, a finding as to the furnishing of these services by petitioner, the Commission not only designedly omits, but, likewise, prevents petitioner from proving the bona fide services it actually rendered. We do not believe this Court will permit such an open disregard of the basic Congressional prerequisite to stand.

As to Respondent's Point 2

We fully agree with respondent's statement (brief, p. 8) that subsection 2(d) of the statute permits payment of nondiscriminatory compensation to a customer "for 'any services or facilities furnished by or through such customer' in connection with the processing, handling or sale of any commodity sold by such customer."

The respondent objects to application of this provision to the compensation paid petitioner herein, however, on the *sole* ground that it does not authorize "receipt by a buyer of a brokerage commission" (brief, p. 8). *This brings us to the very crux of petitioner's case,* and, we submit, is a clear exposition both of respondent's anomalous position and the reversible error in the case at bar.

Petitioner, at the very outset of this proceeding, in its answer (R. 11) to the Commission's complaint, raised the issue, in defending its action, that the so-called "brokerage" was, *in fact,* compensation received for definitely described services actually rendered. It has consistently sought to introduce such evidence (R. 88-89), and the Commission, as consistently, has prevented it from so doing.

Having refused to admit any testimony showing the *true nature* of the compensation petitioner received, and the bona fide services it rendered therefor, the Commission nevertheless proceeded to issue its order of prohibition against receipt of *this identical compensation,* merely by denominating it "brokerage." It now defends its action by asserting that it referred only to "brokerage commission," and that while subsection 2(d) permits other compensation, it does not permit petitioner to receive the former type.

But, giving full weight to this contention, the evidence which petitioner was refused the opportunity to present, shows that the payments which it received were not "brokerage commission," but, *in fact,* were compensation for "services and facilities" *such as the respondent now admits* (brief, pp. 8-10) are compensable under subsection 2(d).

On the Commission's own showing, therefore, its action and the judgment below, we respectfully submit, completely deny to petitioner its statutory "right to * * * show cause why an order should not be entered by the commission,"[2] and directly conflicts with the unbroken line of de-

[2] Clayton Act, 38 Stat. 734; 15 U.S.C.A., sec. 21.

cisions of this Court entitling petitioner to a full and fair hearing on its defense.[3]

As to Respondent's Point 3

What has been said as to respondent's Point 2, applies equally here. The court below disposed of petitioner's contention, that the services rendered by it were compensable under subsection 2(d), by flatly stating that a purchaser could not render services to the seller from whom he buys (R. 106-107). This holding completely nullifies subsection 2(d) of the statute, which, *as pointed out in respondent's brief (p. 8), provides* for that very thing.[4]

The respondent argues, however, that as the cease and desist order applies only to "brokerage" or payment "in lieu thereof" and not to compensation for other services, the proffered evidence was immaterial to the issues in this case (brief, pp. 9-10).

Such an argument, however, entirely disregards two fundamental points involved in this proceeding. First, *no order* can be issued by the Commission herein without a past or present violation of the statute (38 Stat. 734; 15 U.S.C.A., sec. 21); Secondly, the Commission's order admittedly proscribes receipt of "brokerage" or payments "in lieu thereof," but the Commission prevented petitioner from making its proofs as to the true nature of the compensation it received. This evidence, we submit, *under the Commission's own admissions* (brief, pp. 9-10), would be a complete defense to the charge in the complaint, as the

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[4] Compensation for carrying warehouse stocks, and furnishing promotional and selling services and facilities, was prohibited by the Commission, in *Lambert Pharmacal Co.*, 31 F.T.C. 734, *American Crayon Co.*, 32 F.T.C. 306, and *Binney & Smith Co.*, 32 F.T.C. 315, *only* on the ground same was not proportionally available to all competing customers. There is no discrimination in the case at bar.

[3] Cases cited, petition, p. 7.

underlying payments—called "brokerage commissions" by respondent, and which it prohibits petitioner from showing are, *in fact,* something else—*are the identical items.*

The Commission does not deny the services alleged were, in fact, rendered; it does not find the compensation received therefor was discriminatory; but merely by virtue of denominating the compensation "brokerage," *the Commission insists that petitioner is estopped from showing it is anything else.* This means that the matter resolves itself into one of terminology.

Certainly, petitioner's right to receive compensation for its services should not be determined by the name by which it may be called. If such a position were sound, we would be exalting form and ignoring substance. The principle that substance rather than form shall be controlling is too well established to admit of serious controversy, and petitioner only ask that it be allowed to show, as it repeatedly has offered to do, the true nature of the compensation received, and the bona fide services which are actually rendered by it in consideration therefor. It is "not what the payments are called, but what, in fact, they are,"[5] that should govern.

We, again, very respectfully, submit that the proffered evidence is *highly material,* as going to the very root of the charged violation, and refusal to accept such proffered evidence was unreasonable, arbitrary, and wholly prevented petitioner from receiving the full and fair hearing to which it was entitled.

Conclusion

It is significant that, in citing other cases involving construction of subsection 2(c), the Commission does not deny the allegations of the petitioner (p. 7) that this is the first

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[5] *United States* v. *South Georgia Ry. Co.,* 107 F. (2d) 6; *Commissioner* v. *J. N. Bray Co.,* 126 F. (2d) 612.

or test case in which a merchandising broker, following well recognized and established brokerage methods, has been charged with violation of the Robinson-Patman Anti-Discrimination Act, for receiving non-discriminatory compensation, *solely because* in connection with the legitimate service it renders it takes title to some of the goods it distributes.

The Commission, likewise, does not deny that the decision here will penetrate deeply into accepted trade practices, in that many similar cases, involving both processors, or packers, and distributors, are being held by the Commission awaiting the decision of this Court in the case at bar (petition, p. 8).

In addition to the foregoing, we, again, respectfully submit, the judgment below involves a grave departure from the uniform decisions of this Court with reference to the fundamental requirements of findings of fact by administrative agencies, and the granting of full and fair hearings in such proceedings, and that such conflict should not be permitted to stand.

In view of the Commission's brief, the issues are clearly drawn, and further evince, we respectfully submit, that the writ of certiorari should issue as prayed in the petition.

Respectfully submitted,

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